IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.08.2007

CORAM:

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN
AND
THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

Tax Case (Appeal) No.414 of 2007

The Commissioner of Income-tax
Trichy ... Appellant

Vs.

M/s.Combustion Engineering Inc (USA)
by agent M/s.Bharath Heavy Electricals
Limited, Trichy - 14. ... Respondent.

Tax Case Appeal filed under Section 260-A of the Income-tax Act, 1961 against the order of the Income-tax Appellate Tribunal, 'D' Bench, Chennai made in I.T.A.No.573/Mds/1999 dated 15.12.2006 against the Order of the Commissioner of Income Tax (Appeals) Madurai Range, Madurai ITA.No.243/86-87 dt.18.3.88 against the Order of the Inspecting Asst.Commissioner of Income Tax(Assessment)Range-I, Madurai made in PAN.47-034-CU-8854/1984-85 dated 21.10.86 and against the order dt.22.1.99 made in ITA.244/98-99/TRY on the file of the Commissioner of Income Tax(Appeals)XI Chennai and against order dt.25.2.97 made in PAN/GIR.No.C/8854 on the file of the Deputy Commissioner of Income Tax,Special Range, Trichy.

For Appellant : Mr.T.Ravikumar

For Respondent : Mr.Venkatanarayanan

JUDGMENT

(Judgment of the Court was made by K.RAVIRAJA PANDIAN,J.)

The Revenue filed this appeal questioning the correctness of the order passed by the Tribunal in I.T.A.No.573/Mds/1999 dismissing the appeal filed by the Revenue on the ground that COD approval has not been obtained, however, giving liberty to the Department to recall the order of the Tribunal after obtaining the COD approval by framing the following question of law:

"1. Whether on the facts and in the circumstances of the case, the Income Tax Tribunal is right in law in holding that COD clearance is necessary for entertaining an appeal filed by M/s.Combustion Engineering Inc., (USA) which is not a government department?

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2. Whether on the facts and in the circumstances of the case, the Income Tax Tribunal is right in holding that the assessee being represented by their agent BHEL Trichy, they should also obtained COD clearance, especially lwhen the assessee is not a Government department?

3. Whether on the facts and in the circumstances of the case, the Income Tax Tribunal is right in holding that COD clearance is necessary especially when the agent namely BHEL only represents the foreign collaborator?"

2. The material facts, which are necessary for resolution of the questions of law, are as follows:-

The assessee Combustion Engineering Inc.,U.S.A., entered into an agreement with Bharat Heavy Electricals Limited, Trichy for manufacture of high pressure boilers required for thermal power generation. M/s.Bharat Heavy Electricals Limited, a public sector undertaking representing the assessee - foreign company being their collaborators filed return for the assessment year 1984-85 in the representative capacity on 30.06.1984 admitting an income of Rs.2,09,27,650/-. During the previous year, BHEL paid the assessee M/s.Combustion Engineering Incorporation (USA) Rs.1,24,29,628/- as payment for supply of technical documentation/know-how and other services rendered in USA. The assessing officer taxed the above receipts at 50% and 70% for the assessment year 1983-84 and 1984-85 respectively.

3. Aggrieved by the same, appeals were filed by the assessee before the Commissioner of Income-tax (Appeals) who allowed the appeals. The Department filed appeal before the Income Tax Tribunal and the Tribunal upheld the income of Rs.61,01,250/- being the fees for special engineering services to BHEL Trichy in pursuance of an agreement approved by the Government of India on 27.9.1983 though the agreement was dated 16.8.1982. The Tribunal in its earlier order had held that the income was correctly returned by the assessee for the assessment year 1984-85. However, the assessee's agent BHEL, Trichy by letter dated 5.8.1994 had stated that the sum of Rs.6,01,250/- was not included in the income of the assessee returned for the assessment year 1984-85. Thus the assessing officer had reason to believe that there was failure to admit the income chargeable to tax and such income had escaped assessment for the assessment year 1984-85. Hence, notice under Section 148 was served on the assessee after obtaining approval from the Commissioner of Income Tax. Pursuant to the notice issued, a return of income was filed on 27.4.1995 by the assessee. Thereafter notice under Section 143(2)was served and the assessment was finalised including the said amount. Thereafter an order under Section 154 dated 10.09.1998 was passed stating that as sum of Rs.16,05,693/- was the balance tax payable, but due to typographical mistake it was indicated as 'balance refundable'. Aggrieved by the same, the assessee filed appeal before the CIT Appeals, who allowed the appeal. The Department filed appeal before the Tribunal, which dismissed the appeal on the ground that COD clearance was not obtained, without going into the merits of the case. The correctness of the said order is put in issue before this Court in this appeal by formulating the questions of law extracted above.

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4. The learned counsel appearing for the Revenue submitted that the assessee in this case is M/s.Combustion Engineering Incorporation (USA). The Bharat Heavy Electricals Limited is only a representative assessee, the same is evident from the Income tax Assessment order dated 21.10.1986, where the BHEL was shown as a representative assessee. The position is equally evident from the Commissioner's order and other subsequent proceedings dated 10.09.1998 initiated under section 154 of the Income Tax Act. Hence, it is beyond any iota of doubt that M/s.Combustion Engineering Incorporation (USA) is only an assessee and BHEL is a representative assessee of their collaborator. The treatment of the amount paid by BHEL to M/s.Combustion Engineering Incorporation (USA), is the dispute in issue in this case. Hence the Tribunal ought to have considered the issue on merits without shirking the responsibility on the ground that COD had not been obtained. The COD approval is essential only for a dispute between the Government of India undertaking as against the Government, etc. Here the dispute is not pertaining to the assessment order made of the agent BHEL. Hence, in respect of the dispute between M/s.Combustion Engineering Incorporation and the Revenue, the COD certificate is not essential. He relied on the following decisions.

(1) Mahanagar Telephone Nigam Limited Vs. Chairman,Central Board, Direct Taxes and another (2004) 267 ITR 647,

(2) Union of India Through Central Organisation Railway Vs. Union of India Through Secretary, Ministry of Finance and others (2006) 285 ITR 362 (All.)

5. However, the learned counsel appearing for the assessee submitted that the representative assessee is deemed to be the assessee in all respects. Hence COD certificate is essential as directed by the Supreme Court in the case of Oil and Natural Gas Commission and another vs. Collector of Central Excise reported in 1995 Supp (4) SCC 541. Hence the order of the Tribunal dismissing the appeal cannot be complained of. He further contended that order of the Tribunal cannot be regarded as prejudicial to the revenue as the Tribunal has given liberty to recall the order on obtaining the certificate from the appropriate authority for filing an appeal.

6. We have heard the arguments of the learned counsel on either side and perused the material on record.

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7. On perusal of the order of the Tribunal, we are of the view that the Tribunal has disposed of the appeal filed by the revenue for the purpose of disposal only, which is evident from the following:

"This appeal by the Revenue relates to the assessment 1984-85. It arose out of the order of the learned CIT(A) XI, Chennai dated 22.01.1999.

2. After several opportunities, the Department could not clarify the details and lost the opportunities several times given to the Department.

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3. While stating the case, the learned Counsel for the assessee submitted that the assessee's appeals were dismissed by the Tribunal in ITA Nos.185 &186/Mds/05 order dated 20.10.2006 on the ground that the COD approval was not obtained. This assessee also represents Bharat Heavy Electrical Limited, Trichy. So applying the same ratio and in the absence of COD approval, keeping the file pending for long will not serve any purpose. Hence, we are dismissing the appeal of the Revenue for want of COD approval. It is further clarified that the Department has the liberty to recall this order of the Tribunal after obtaining the COD approval."

8. From the facts narrated above, it is clear that the assessee is M/s.Combustion Engineering Inc. (USA). The Bharat Heavy Electricals Limited, Trichy, a Government of India undertaking is only its agent represented the assessee M/s.Combustion Engineering Inc. (USA) as a representative assessee. As per Section 160(1)(i), for the purpose of Income-tax Act, in respect of the income of a non-resident specified in sub-section(1) of section 9, the agent of the non-resident, including a person who is treated as an agent under section 163 of the Act would be regarded as representative assessee. The agent in relation to non-resident includes any person in India, who has any business connection with the non-resident as per Section 163(1) of the Income-tax Act.

9. Thus, the Bharat Heavy Electricals Limited, Trichy, which is having a business connection with the assessee Combustion Engineering Inc. (USA), is only an agent to the non-resident assessee for the purpose of assessment under the Income-tax Act. To put it otherwise, in the case on hand, the assessee is M/s.Combustion Engineering Inc. (USA). The assessment and other proceedings have been made in the name of the assessee M/s.Combustion Engineering Inc. (USA). Appeals have been filed by the assessee represented by agent Bharat Heavy Electricals Limited. It is also pertinent to state here that the Income-tax Act defines public sector company to mean any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956) under Section 2(36A).

10. Now, let us consider whether the COD approval is necessary to entertain a case filed by the Revenue against the assessee M/s.Combustion Engineering Inc. (USA). In this context, it is useful to extract here the relevant paragraphs of Oil and Natural Gas Commission Vs. Collector of Central Excise (1995) Supp 4 SCC 541, which reads thus:

"3. We direct that, the Government of India shall set up a Com-mittee consisting of representatives from the Ministry of Industry, the Bureau of Public Enterprises and the Ministry of Law, to monitor disputes between Ministry and Ministry of the Government of India, Ministry and public sector undertakings of the Government of India and public sector undertakings in between themselves, to ensure that no litigation comes to court or to a Tribunal without the matter having been first examined by the Committee and its clearance for litigation. The Government may include a representative of the Ministry concerned in a specific case and one from the Ministry of Finance in the Committee. Senior officers only should be

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nominated so that the Committee would function with status, control and discipline.

4. It shall be the obligation of every court and every Tribunal where such a dispute is raised hereafter to demand a clearance from the Committee in case it has not been so pleaded and in the absence of the clearance, the proceedings would not be proceeded with."

(underline supplied)

11. In Mahanagar Telephone Nigam Limited Vs. Chairman,Central Board, Direct Taxes and another (2004) 267 ITR 647, a notice of reassessment under section 148 of the Income-tax Act, 1961, for the assessment year 1994-95 was issued against the appellant therein, a public sector company, the matter was referred to the High Powered Committee formed by the Government of India pursuant to the order of the Supreme Court, from which clearance had to be obtained for litigation by Government Departments or public sector bodies. The Committee resolved that since the appellant was contemplating a writ petition against a show cause notice the appellant was advised to await the appealable order and accordingly did not permit the contemplated litigation. The appellant, however, filed a writ petition challenging the notice and the High Court dismissed the same on the merits. On appeal, the Supreme Court held that as the High Powered Committee had not given clearance to the appellant, the proceedings could not be proceeded with. The High Court was wrong in dealing with the merits of the matter.

In Union of India Through Central Organisation Railway Vs. Union of India Through Secretary, Ministry of Finance and others (2006) 285 ITR 362, when the two Departments of Union of India, Railway and Finance brought out a litigation, the Allahabad High Court after referring the judgment of Supreme Court in Oil and Natural Gas Commission v. Collector of Clkentral Excise (1995) Supp (4) SCC 541 and Chief Conservator of Forests, Government of Andhra Pradesh Vs. Collector (AIR 2003 SC 1805) held that it was mandatory obligation of every court and every Tribunal to demand a clearance from the Committee in case it has not been so pleaded and in the absence of the clearance, the proceedings would not be proceeded with. The reason for such direction was also amplified in the judgment of the Supreme Court in Chief Conservator of Forests, Government of Andhra Pradesh Vs. Collector (AIR 2003 SC 1805) in the following manner:

"14. The facts of this appeal, noticed above, make out a strong case that there is a felt need of setting up of similar committees by the State Government also to resolve the controversy arising between various departments of the State or the State and any of its undertakings. It would be appropriate for the State Governments to set up a committee consisting of the Chief Secretary of the State, the Secretaries of the departments concerned, the Secretary of Law and where financial commitments are involved, the Secretary of Finance. The decision taken by such a committee shall be binding on all the departments concerned and shall be the stand of the Government.

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16. Now, reverting to the facts of the case on hand, we are of the view that after the said statutory order of the Commissioner of Survey, Settlement and Land Records, the matter should have rested there. We have, therefore, no hesitation in coming to the conclusion that it was not only inappropriate but also illegal for the Chief Conservator of Forests, though he might have done so in all good faith, to have questioned the order of the Commissioner of Survey, Settlement and Land Records before the High Court of Andhra Pradesh in Writ Petition (C) No. 3414 of 1982. The Chief Conservator of Forests as the petitioner can neither be treated as the State of Andhra Pradesh nor can it be a case of misdescription of the State of Andhra Pradesh. The fact is that the State of Andhra Pradesh was not the petitioner. Therefore, the writ petition was not maintainable in law. The High Court, had it deemed fit so to do, would have added the State of Andhra Pradesh as a party; however, it proceeded, in our view erroneously, as if the State of Andhra Pradesh was the petitioner which, as a matter of fact, was not the case and could not have been treated as such. As the writ petition itself was not maintainable, it follows as a corollary that the appeal by the Chief Conservator of Forests is also not maintainable. We are unable to accept the contention of Ms.Amareswari that merely because the officer concerned had obtained the permission of the Government to file an appeal, which is not placed before us, the writ petition and the appeal should be treated as an appeal by the Government of Andhra Pradesh. The permission granted to the authority concerned might be a permission to file an appeal which cannot reasonably be construed as authorisation to file the appeal in his own name, contrary to law. It could only be a permission to file the appeal in the name of the State of Andhra Pradesh in accordance with the provisions of the Constitution and the Civil Procedure Code. We may also record that in spite of the pattedars taking objection to that effect at the earliest, no steps were taken to substitute or implead the State of Andhra Pradesh in the writ petition in the High Court or in the appeal in this Court."

12. As could be seen from the above rulings, clearance from the Committee constituted pursuant to the direction of the Supreme Court is necessary only when there exists a dispute between the Ministry and Ministry of Government of India, Ministry and Public sector undertakings of the Government of India and public sector undertakings in between themselves. The assessee, a non-resident cannot by any stretch of imagination be considered as a public sector undertaking with reference to the definition under Section 2(36A). Likewise, the requirement cannot be extended to cases where an assessee is represented by a public sector undertaking as an agent to them. Of course, it might be correct on the part of the Tribunal to dismiss the appeal filed by the revenue against Bharat Heavy Electricals Limited, a public sector undertaking in I.T.A.Nos.185 and 186/Madras/05 on the ground that the COD approval was not obtained. But the appeal filed by the revenue against the assessee, a non-resident, who is represented by an agent, a public sector undertaking, pursuant to an agreement entered into for certain business connection, cannot by any stretch of imagination be regarded as a public sector undertaking. The order of the Tribunal disposing the appeal non-suiting the revenue to prosecute further on the ground that COD approval was not

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obtained is nothing but misconception of the direction of the Supreme Court in ONGC case referred above.

13. In the light of the above discussion, all the questions of law have been answered in favour of the revenue and the appeal is allowed and the order of the Tribunal is set aside with a direction to restore the appeal on file and dispose it off on merits.

rg/usk

Sd/-
Asst.Registrar

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Sub Asst.Registrar

To
1. The Asst.Registrar,
Income-tax Appellate Tribunal
3rd Floor, Rajaji Bhavan, Besant Nagar,
Chennai.

2. The Commissioner of
Income-tax , Trichy.

3. Commissioner of Income-tax (Appeal)
Madurai Range, Madurai.

4. Inspecting Asst. Commissioner of Income Tax
(Assesment)Range-I
Madurai.

5. The Commissioner of Income Tax (Appeals) XI,
Trichirappalli.

6. Deputy Commissioner of Income Tax,
Special Range, Trichy.

+1 cc to Mr.N.Murali Kumaran, Advocate Sr.No.52264.

GG(CO)
dcp/12.9

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